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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 420

PACIFIC NATIONAL FIRE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

J. J. MICKELSON, Trustee in Bankruptcy of the Estate of WIRT COOK, an individual doing business as ST. PAUL SPORTING GOODS COMPANY, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Opinion of The United States Court of Appeals for The Eighth Circuit 1a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No.

PACIFIC NATIONAL FIRE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

J. J. MICKELSON, Trustee in Bankruptcy of the Estate of WIRT COOK, an individual doing business as ST. PAUL SPORTING GOODS COMPANY, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pacific National Fire Insurance Company, a corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on July 10, 1956.

Opinions Below.

The opinion of the District Court is reported at 132 Fed. Supp. 670, and will be found at page 12 of the printed Record. The opinion of the Court of Appeals has

not yet been officially reported but is set out in the Appendix to this Petition, page 1a.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The judgment of the Court of Appeals was entered on July 10, 1956. A petition for rehearing was filed by petitioner and was denied by an order entered Friday, August 10, 1956. Jurisdiction of this Court is invoked under 20 U.S.C., § 1254 (1).

Questions Presented.

1. Can Federal Courts make findings of fact which are contrary to all the evidence, when that evidence is not only uncontroverted but overwhelming?

2. Do not the Courts of Appeals have the duty to reverse findings of ultimate facts which are contrary to the evidence?

3. Can the Federal District Courts ignore the controlling substantive law in the States in which they sit?

Rules Involved.

Rule 52 (a) of the Federal Rules of Civil Procedure reads in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

STATEMENT.

This is an arson case. Suit was brought by J. J. Mickelson, Trustee in Bankruptcy of the Estate of Wirt Cook, an individual doing business as St. Paul Sporting Goods Company, against the Pacific National Fire Insurance Company, a corporation, to recover on a policy of fire insurance issued by Pacific National. The policy covered the St. Paul Sporting Goods Company. A second suit was brought against the Homeland Insurance Company on its policy of insurance. The United States intervened in the suits to protect its lien for unpaid income taxes and penalties due from Wirt Cook. The amount of the lien was $6633.38 (R. 9). The amount of the insurance issued by the Pacific National Fire Insurance Company was $38.000.00 (R. 24). Since the actual cash value of the insured stock at the time of the loss was $26,662.71 and the loss and damage was $18,912.71 (R. 24), there remained from the salvage ample funds, $7,750.00 to cover the lien of the United States.

The case was tried to the Court without a jury and resulted in judgment against your petitioner. This judgment was appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the judgment below and a petition for rehearing was denied.

In the words of the District Court Judge, the principle question at the trial was whether or not the fires were of an incendiary origin (R. 13). A finding that the fires were not incendiary in origin would necessarily absolve Cook or anyone of any responsibility for setting the fires. There was no dispute as to the liability of your petitioner provided the fire was not of incendiary origin and was not set by or on behalf of Wirt Cook.

The fires out of which the litigation arose occurred on Wednesday, October 8, 1952. The St. Paul Fire Department responded to the fire. Firemen arrived at the store about 11:34 P.M. (R. 57). Investigations by the St. Paul Fire and Police Departments were made. The Fire Chiefs who responded to the fire alarm, the qualified arson investigators of the St. Paul Fire and Police Departments and the Deputy State Fire Marshal all concluded that two separate fires had been set in the store. (R. 26, 27, 48, 59, 60, 61, 68, 75, 77). They also observed evidence of a third fire in the basement which had occurred at some prior date (R. 32, 53, 64). The evidence also showed that the store had only one door (R. 52) and that there were only two keys to the store (R. 52). The store clerk, Hansen, had one key and Wirt Cook had the other. (R. 52, 85). Hansen and his wife both testified (R. 52, 55) that about 6:00 o'clock in the evening of October 8, 1952, he locked the door. His wife was present, she left some parcels in the store, they went to a nearby restaurant and had dinner and came back about 7:00 P.M. They unlocked the door, got the parcels, then relocked the door. Hansen then tried it to be certain that it was locked. Hansen and his wife both accounted for their whereabouts after they left the store until they were apprised of the fire. No motive for the burning of the store can be attributed to Hansen.

When the St. Paul Fire Department responded to the fire call, they found the door of the store unlocked (R. 57, 60). There was no evidence of anyone having broken into the store (R. 60).

The overwhelming and uncontradicted evidence showed that Wirt Cook was in financial difficulty at the time of the fire (R. 32, 39, 72). His business showed heavy losses during the year 1952, up to the time of the fire (Ex. Z,

R. 101-106). He was being pressed for payment by the government (R. 40), by the people from whom he originally purchased the business (R. 40, 41, 73), and by merchandise creditors (R. 34-36, 96-97). Judgment had been obtained against him. (R. 37, 38, 96). Life insurance on himself and his wife was cancelled for non-payment of premiums (R. 33). Notice of these cancellations were received by Cook shortly before the fire. Other judgments were threatened (R. 35, 36). His bank accounts were practically depleted (R. 74). A large number of his checks had come back for insufficient funds (R. 62, 74). Threat had been made to cut off his telephone service (R. 74).

The uncontradicted evidence also showed that prior to December, 1949, Cook was employed as the branch sales manager of the Ford Motor Company in St. Paul (R. 38). At that time automobiles were hard to get. He distributed Ford cars to the dealers and personally and illegally received from the dealers $100.00 per car in what he termed "under-the-counter payments". During these operations he made in the neighborhood of $40,000.00 (R. 39). Cook did not report any of this income to the United States Government, but they caught up with him about a year and a half later (R. 40).

The undisputed evidence concerning Cook's movements on October 8, 1952, the date of the fire, shows that Cook had ample time to set fire to the store. Cook left the store that afternoon between 3:00 and 4:00 o'clock and went home (R. 81). He had dinner and then drove to the Dyckman Hotel in Minneapolis for a 7:00 o'clock appointment with a sporting goods salesman (R. 81). He then left the hotel somewhere between 9:00 and 9:30 P.M. (R. 81) and drove by automobile to White Bear, Minnesota, to keep an appointment with a school official regarding a

possible sale of his merchandise. He arrived in White Bear about 10:00 P.M. (R. 81). Cook stated that he left the home of the school official between 10:30 and 10:45 (R. 81) and proceeded to his home. He made one stop for gas.

At 11:34 P.M. the fire department arrived at Cook's store (R. 57). John P. Geduldig, Jr., who heard the fire department come to Cook's store, thereafter he walked across the street to a hamburger stand and called Cook's home to inform him of the fire. Cook was not home when his wife received the call (R. 82). Cook was home when Detective Fahey called him at 11:55 P.M. (R. 57).

It is 12.1 miles from White Bear to the store (R. 49) and Cook drove his automobile about 60 M.P.H. (R. 88). Cook could drive from White Bear to his store at this rate in less than 15 minutes. Cook also testified that it takes between 10 and 15 minutes to drive between the store and his house (R. 89). Between 10:30 P.M. when he left White Bear and his arrival at his home there is fully one-half to three-fourths of an hour unaccounted for. During this period of unaccounted time, Cook had ample opportunity to set the fires.

The Basis of Federal Jurisdiction.

Jurisdiction is based on 28 U.S.C., § 1332 (a) (1). There is diversity of citizenship between the parties and the matter in controversy exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT.

I.

This Court's Supervisory Powers Over the Federal Judiciary Must Be Exercised to Prevent the Subtle Erosion of Accepted and Relied Upon Principles of Law.

The defense of arson is asserted in fire loss suits involving well over $1,000,000 each year. These suits are almost all brought in or removed to the Federal courts. This is a branch of a Federal practice which is usually not publicized or talked about as much as its actual importance would merit, and is certainly not given the attention received by some areas of Federal practice which do not affect nearly as many people or touch nearly as close to the heart of the personal affairs of the average citizen.

Practically every home owner, business man, or farmer is affected by the trial of a fire insurance claim. Every honest fire insurance buyer will have his premiums affected by how much of the load of the dishonest buyers the Federal courts force him to shoulder.

This Court recognizes as a ground for exercise of its discretion the situation where the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned a departure by a lower court, as to call for an exercise of this Court's power of supervision." This Court acts in such cases where it feels proper supervision of the Federal judiciary requires that the lower court be set right. This is usually the case where the decision below represents a subtle erosion of a legal principle, as in this case. Thus, in *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333 (1933), this Court exercised its discretion to review the refusal of the lower courts to decide the facts according to the only

evidence which was before the courts. It is a familiar principle of law both in the Federal courts and in the State of Minnesota that a court may not disregard undisputed and unimpeached testimony and turn instead to speculation. *Kuykendall* v. *United Gas Pipeline Co.*, 208 Fed. (2d) 921 (C.C.A. 5, 1953); *Winn* v. *Consolidated Coach Corp.*, 65 Fed. (2d) 256 (C.C.A. 6, 1933) (Both of the foregoing decisions follow the *Chamberlain* decision, *supra*); *O'Leary* v. *Wangensteen*, 175 Minn. 368, 221 N.W. 430 (1928); *State, by Attorney General* v. *Riley*, 213 Minn. 448, 7 N.W. 2d 770 (1942).

Departures from accepted practice occurred in the lower courts in the above cases but were corrected on appeal. Similar departures from accepted practice will remain uncorrected if the present case is allowed to stand. Home owners making claims for insurance, and insurance companies opposing those claims which they find are dishonest, are entitled to exect trials based on the evidence presented. The majority of fire insurance cases are tried in the Federal courts because these parties thought they had found such accepted practice to be the rule in Federal courts.

The present case went in favor of the dishonest claimant and against the insurance company despite undisputed evidence. But if the Federal courts are permitted to decide cases despite the evidence, either according to whim or according to some irrelevant spur, such as the urge in the present case to grant unnecessary protection to the Federal government's lien, which was never in danger—if the Federal court may do this, there is no guarantee that the next time or the time after that it will not be an honest and worthy claimant who is hurt.

As will be shown by the rest of this petition, this decision is in conflict with all the evidence and with all the deci-

sions which guide courts on how to apply such evidence. As has been already shown, this case involves an important phase of Federal practice—a phase which affects the affairs and lives of almost every citizen of this country (either in his present good fortune to own a home, or in his strivings, the hope and heritage of every American, to attain that good fortune). This case goes straight to the honor of the Federal court system. That is why this Court has retained for itself the discretion to review a case like this. That is why this Court has exercised that discretion in such cases as this and in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 68 Sup. Ct. 525 (1948) (reversing a trial court's findings of fact, because as stated at page 395, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"); or *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333.

II.

The Court of Appeals Has the Duty to Reverse the District Court Where the Findings of Fact Were Contrary to All the Evidence.

The proper rule to be applied in the appellate review of findings of fact is well known to the Court of Appeals for the Eighth Circuit, and probably has not been stated much better than it was stated by the same Court in *Greenspon* v. *Commissioner*, 229 Fed. (2d) 947, 949 (1956):

> "Findings of fact * * * are not binding upon this Court if there is no substantial evidence to sustain them, if they are against the clear weight of the evidence or if they are induced by an erroneous view of the law."

The need to apply this rule usually arises in those cases where the supposed findings of fact are really conclusions as to the ultimate results rather than findings of specific events or things. For some reason the trier of fact has misunderstood the significance of the real facts which were presented to him.

In the present case, for instance, after a complete inspection in the store at the time of the fire by the Fire Chiefs who responded to the alarm, by the qualified Fire Investigators of the St. Paul Fire and Police Departments, and by the Deputy State Fire Marshal, it was found by them that there were two separate and distinct fires in the store, that there was no condition in the store which caused the fires and that the fires were of incendiary origin set by human hands (R. 32, 77). These are the basic facts and the only ultimate fact that could be found therefrom was that the fire was of incendairy origin. Yet the District Court erroneously found that the fires were of undetermined origin (Finding 3, R. 18). The Trial Court refused to find that the fires were incendiary in origin. Said the Court in its opinion (R. 16):

> "Despite the strong case made by the defendant to the effect that the fire appeared to be incendiary in origin, there is no sufficient basis for a finding of fact to that effect."

It should be noted particularly that there is *no conflict* with the evidence of the incendiary nature of the fire. Plaintiff made no attempts to contradict it. Nor is there any question as to the credibility of the witnesses. The Trial Judge extolled their "ability and integrity" (R. 17). This is the sort of thing which must be set right by the Appellate Court. That is why we have Rule 52 (a) and appellate review of trials.

But the Appellate Court did not correct the above error of the Trial Judge, because it assumed that such error was without prejudice (Appendix, 7a). Clearly, the error *was* prejudicial because it went to *the* crucial issue of material fact in the case. Once the Trial Judge ruled that the fires were not of incendiary origin, *i.e.* not set by a human agency, he had to find that the fires were not set by anyone—Wirt Cook or anybody on his behalf. Thus, by disregarding the uncontradicted evidence of the incendiary origin of the fire, the Trial Judge reached his erroneous decision and should have been reversed by the Court of Appeals.

In another instance, the Trial Judge in his opinion stated that "no benefit from insurance would accrue to accused" because his creditors would have gotten the insurance money instead of himself (R. 16). Instead of correcting this naive view of human nature, the Court of Appeals compounded it by adopting the same view. Yet any experienced person knows that a business man will profit (or at least will in his own mind have the impression that he will profit) if the more pressing of his creditors are paid off and he is given a breathing spell. As the Court said in *State* v. *Lytle*, 214 Minn. 171, 7 N.W. 2d 305, 309:

> "Defendant, and defendant only, had a motive for setting the fire and an expectation of some profit *or solution of his financial difficulties by collecting insurance.*" (Our italics.)

Fact by fact, the District Court's findings must be set aside. The facts are that the fires were of determined origin, to-wit, arson. Wirt Cook benefited by this fire. Wirt Cook needed this fire to bail him out of his difficulties. Only two people could have set the fires, Wirt

Cook or his clerk (who had the other key to his store) and the clerk had no reason to set the fires and accounted fully for his whereabouts prior to the fires. Cook had the only motive to burn. Wirt Cook has not been able to account for his whereabouts at the time the fire must have been set. Wirt Cook did not even testify that he did not set the fires.

III.

The Decision Below Departed From the Principles of Law Established by the State Courts.

The Minnesota courts have stated what constitutes arson, succinctly and in line with the general rule in all the courts of this country. These statements are in criminal cases where the requirements of proof are much stricter than in civil cases. Arson is proved where the culprit has the opportunity to set the fire, fire insurance is equal to or more than the value of the property insured, and the culprit is in dire financial straits and his creditors are pressing. *Sumrall* v. *Provident Washington Insurance Company,* 60 So. (2d) 68, 221 La. 633, 7 Fire Insurance Casualty Cases, 884 (1952); *Commonwealth* v. *Selesnick,* 272 Mass. 354, 172 N.E. 343 (1930).

The law governing arson-insurance cases is well stated in the Minnesota case of *State* v. *Lytle,* 214 Minn. 107, 7 N.W. 2d 305, p. 309 (1943).

> "The universal law is that where there is fire insurance equal to or more than the value of the property insured, and the assured is in dire financial circumstances and creditors are pressing for payment and the fires are incendiary, that is sufficient evidence to establish a motive on the part of the assured to set the fire even though evidence does not disclose the physical presence of the insured at or near the place of the fire."

Common sense demands that honest home owners not support the arsonist. The law follows common sense and makes arson a defense to a fire insurance claim, but such protection for the honest home owners requires that the triers of fact in such cases avoid arbitrariness and irresponsibility. The triers of fact must do their job well if justice is to prevail. That is the reason that all of the courts in this country in their fire insurance cases are in accord with the rule stated in the Minnesota criminal cases, *supra*. Thus, in the *Sumrall* case, *supra* (contrary to the erroneous statement of it by the Court of Appeals here), the evidence was nothing like the clear evidence in this case. (See Petition For Rehearing at point II, p. 3).

The Court of Appeals owed it to the litigants and other people of this country to follow the rules of these cases. It is essential that this Court set the two lower courts straight on this. Otherwise, the rule will be established in this important branch of Federal practice that the evidence need not be followed.

CONCLUSION.

We respectfully submit that this Honorable Court should take this case for the following reasons:

1. The principles laid down in the cases we have cited and the undisputed facts on the crucial issue of incendiarism in the case at bar show that a clear and serious error has been committed by the Trial Court. This error stands uncorrected by the Court of Appeals for the Eighth Circuit. The decisions rendered in the courts below are in conflict with decisions of this Honorable Court, various United States Circuit Courts of Appeals and the Supreme Court of Minnesota. If permitted to stand without correction by this Court, the decisions in the courts below will lead to uncertainty and confusion among the bench and bar as to what is the duty of a trial judge regarding undisputed evidence on essential issues.

2. A proper decision in the case at bar is important for the large area of the law dealing with arson. In the numerous suits brought to recover on insurance policies for fire loss, where the defense is arson, it is incumbent upon the defendants to prove two things: (1) the fire was incendiary in origin, and (2), the fire was set by, for or on behalf of the insured. Proper findings of fact on these points *based on the evidence* are essential to the just decisions of those cases and to the rendering of decisions which will become proper authorities to be applied to similar cases which will arise in the future. Arbitrariness and irresponsibility by triers of the facts in these cases leave this important part of the law unauthoritative and confused. This Honorable Court now has the opportunity to keep the law in this area clear.

PRAYER.

For the reasons herein given, petitioner prays for a writ of certiorari directed to the United States Court of Appeals for the Eighth Circuit to the end that the judgment of that Court may be reviewed by this Court and reversed with directions that the findings and judgment of the Trial Court be reversed.

Respectfully submitted,

SAMUEL LEVIN,
231 South LaSalle Street,
Chicago 4, Illinois,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,523.

Pacific National Fire Insurance Company, a corporation,
Appellant,
vs.
J. J. Mickelson, Trustee in Bankruptcy of the Estate of Wirt Cook, an individual doing business as St. Paul Sporting Goods Company, and United States of America,
Appellees.

Appeal from the United States District Court for the District of Minnesota.

(July 10, 1956.)

Samuel Levin (LeRoy Bowen was with him on the brief), for Appellant.

W. M. Kronebusch, for Appellee, J. J. Mickelson, Trustee.

Before GARDNER, Chief Judge, and VOGEL and VAN OOSTERHOUT, Circuit Judges.

VOGEL, Circuit Judge.

J. J. Mickelson (plaintiff-appellee), Trustee in Bankruptcy of the Estate of Wirt Cook, an individual doing business as St. Paul Sporting Goods Company, brought

this suit against Pacific National Fire Insurance Company, a corporation, (defendant-appellant) to recover on a policy of fire insurance issued by the appellant to the St. Paul Sporting Goods Company. A second suit against the Homeland Insurance Company on its policy of insurance awaits, by stipulation, the outcome of this appeal. The United States intervened in the suits to protect its lien for unpaid income taxes and penalties due from Wirt Cook. This suit was tried to the court without a jury and resulted in judgment against the appellant. The principal question at the time of trial in District Court was whether Wirt Cook was responsible for causing the fires which resulted in the damage to the insured property. The sole issue then was one of fact. There was no dispute as to the liability of the appellant pursuant to the coverage contracted for, provided the fire was not intentionally set by, for or on behalf of the insured, Wirt Cook.

The fire out of which the litigation arose occurred around midnight on Wednesday, October 8, 1952. The insured, Wirt Cook, left the premises where he conducted his business at about 4:00 p. m. and proceeded to his home on Mississippi River Road, where he had dinner with his family. He then drove to the Dyckman Hotel in Minneapolis for a 7:00 p. m. appointment with a sporting goods salesman. Following this meeting, he left alone about 9:30 p. m. by automobile for an appointment with a school official at White Bear, Minnesota, in connection with a possible sale of his merchandise. He arrived at White Bear about 10:00 p. m. He stayed until about 10:30 or 10:45. He then left for his home, arriving there about 11:30 p. m. He was there informed by his wife that she had just had a telephone call advising that the store was on fire. While waiting for his wife to dress for the purpose of accompanying him, Cook received a confirming telephone call

from the St. Paul Police Department, that call being between 11:30 p. m. and midnight.

Investigations by the St. Paul Fire and Police Departments were made. The investigators concluded that two separate fires had been set in the store shortly before midnight on October 8, 1952. They also observed evidence of a third fire in the basement which had occurred at some prior date. The evidence indicated that the store had only one door and there were only two keys to the door. A store clerk, Hansen, had one key and Wirt Cook had the other. Hansen and his wife both testified that about 6:00 o'clock in the evening of October 8, 1952, he locked the door. His wife was present. She left some parcels in the store. They went to a nearby restaurant and had dinner, coming back about 7:00 o'clock p. m. They unlocked the door, got the parcels and then relocked the door, after which Hansen tried it to be certain that it was locked. Hansen and his wife both accounted for their whereabouts after they left the store until they were apprised of the fire. No motive for the burning of the store can be attributed to Hansen.

When the St. Paul Fire Department responded to the fire call, they found the door to the store unlocked. There was no evidence of anyone having broken into the store. The evidence indicated that Wirt Cook was in financial difficulty at the time of the fire. His business showed a heavy loss during the year 1952 up to the time of the fire. He was being pressed for payment by the government, by the people from whom he originally purchased the business, and by merchandise creditors. Judgments had been obtained against him. Life insurance on himself and his wife was cancelled for non-payment of premiums, notices of which Cook had received shortly before the fire. Other

judgments were threatened. His bank accounts were practically depleted. A large number of his checks had come back for insufficient funds. Threat had been made to cut off his telephone service.

Cook's financial history sometime prior to buying the St. Paul's Sporting Goods Company was gone into at some length. It appeared that prior to December, 1949, Cook had been employed as a branch sales manager of the Ford Motor Company in St. Paul. At that time automobiles were hard to obtain. He distributed Ford cars to dealers and others and illegally received from the dealers $100.00 per car in what he termed "under-the-counter payments". As a result of these operations, Cook accumulated approximately $40,000.00. Sometime later "the Government finally caught up * * *" to Cook and at the time of the fire he was still owing substantial amounts on income tax liability.

The trial court found specifically that the fire "* * * was of undetermined origin and not intentionally set by, for or on behalf of the insured named in said policy" and entered judgment for the appellee.

Appellant complains in this court that "the clear and uncontroverted evidence shows incendiary fires, pressing debts, judgments and motive to collect insurance", that "the trial court's opinion, findings and judgment are against the manifest weight of the evidence and erroneous", and that this court has authority to reverse the judgment. In other words, the appellant is asking this court to set aside the trial court's findings of fact and hold that on the evidence the fire was incendiary in nature and was set by the insured, Wirt Cook, and to order judgment for the appellant.

Appellant argues that in Minnesota, the law of which state is controlling herein, in an action on a policy of in-

surance to recover for fire loss it is only necessary to prove a defense by a preponderance of the evidence, citing *Thoreson* v. *Northwestern Nat'l Ins. Co.*, 29 Minn. 107, 12 N. W. 154. Appellant cites *State* v. *Lytle*, 214 Minn. 171, 7 N. W. 2d 305, as being directly in point and decisive of this case. That case merely held that the circumstantial evidence introduced by the state was sufficient to justify the jury in finding that the fire which the defendant was accused of setting was an incendiary fire and that defendant set it. In that case, the Supreme Court of Minnesota was passing upon the sufficiency of the evidence to justify a verdict of guilty by the jury. That is not our situation in the instant case and that case is not authority for appellant's contention.

The *Lytle* case and the other Minnesota cases relied upon by the appellant are authority for the proposition that circumstantial evidence, including evidence of motive and opportunity, such as we have in the instant case, are sufficient to justify sustaining, on appeal, the ultimate conclusion of the fact-finding agency. They are not authority for the proposition that circumstantial evidence, such as we have here, will justify this court in reversing the conclusions of a jury or the trial judge who sat in place thereof.

Only one case cited by the appellant lends some support to its contention. In *Sumrall* v. *Providence Washington Ins. Co.*, 7 Fire & Cas. Cases p. 884, 60 S. 2d 68, 221 La. 633, the Supreme Court of Louisiana reversed the district court in a somewhat similar situation. A careful reading of that opinion, however, indicates that the facts supporting the contention that the insured set the fire or had it set for him were a great deal stronger than they are in the instant case. The evidence connecting the insured

with the setting of the fire in that case was overwhelming. In that case, strange as it may seem, a sheriff and his deputy, in investigating another fire, had taken photographs of the interior of plaintiff's house shortly before the fire, which photographs disclosed a condition which would justify only the conclusion that the fire was incendiary in nature. The evidence in that case justified the appellate court's reversal of a clearly erroneous finding. We do not consider the situation herein as being comparable. There is no direct evidence which hooks up Wirt Cook with the setting of the fire. Possible motive and possible opportunity only have been shown. Wirt Cook was not seen anywhere near the place of the fire at or near the time thereof. His movements are accounted for. We do not consider the evidence against him nearly so strong as that introduced in the *Sumrall* case and therefore do not view it as comparable.

There is little question in our minds but what from the evidence disclosed by the record the trial court could have found that this was an incendiary fire and that it was set by or on behalf of the insured, Wirt Cook. The point is, however, that the testimony was entirely circumstantial and the burden and responsibility of making the ultimate conclusion on conflicting testimony or testimony which is merely circumstantial rests with the jury or, where a jury has been waived, with the court itself.

With reference to the findings of a trial court, we said, in *Imperial Assur. Co.* v. *Joseph Supornick & Son*, 8 Cir., 1950, 184 F. 2d 930, 933:

"Findings of the trial court are presumptively correct and will not be set aside unless clearly erroneous, due regard being given to the opportunity of the trial court

to judge of the credibility of the witness. Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A."

See also *Pendergrass et al.* v. *N. Y. Life Ins. Co.*, 8 Cir., 1950, 181 F. 2d 136, 138, post.

The appellant attacks the finding of the trial court to the effect that "the fire was of undetermined origin". Appellant complains:

"* * * that the Trial Judge erroneously found that the fire in question 'was of undetermined origin and not intentionally set by, for or on behalf of the insured named in said policy'. This conclusion of the Trial Judge is we submit contrary to the manifest weight of the evidence. *The evidence of incendiarism is undisputed.*" (Emphasis supplied.)

Even if it was error to fail to find that the fire was incendiary in nature, the error is without prejudice. The important fact question was whether or not the fire was intentionally set by, for or on behalf of Wirt Cook. The trial court found specifically that the fire was "* * * not intentionally set by, for or on behalf of the insured named in said policy." As already pointed out, there was no direct evidence to the effect that Wirt Cook set the fire. The evidence was only circumstantial. The burden of proving incendiarism on the part of Wirt Cook rested on the appellant. The trial court held that that burden had not been met. See *Barich* v. *Pa. Fire Ins. Co.*, Minn. 1934, 191 Minn. 628, 255 N. W. 80.

The appellant herein cites *United States* v. *Gypsum Co.*, 1947, 333 U. S. 364, 395, and quotes as follows:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The foregoing is inapplicable here because we are not left with the "definite and firm conviction that a mistake has been committed".

This court commented on the statement in the *Gypsum* case in *Pendergrass et al.* v. *N. Y. Life Ins. Co.*, 8 Cir., 1950, 181 F. 2d 136, 138, supra, as follows:

"The opinion in that case shows that the Supreme Court regarded the findings which it held to be erroneous as contrary to the clear weight of the evidence. The statement above quoted, when read in connection with what was later said by the Supreme Court on the same subject in *Graver Tank & Mfg. Co., Inc.*, v. *Linde Air Products Co.*, 336 U. S. 271, 275-276, 69 S. Ct. 535, furnishes no warrant for the belief that we can retry doubtful issues of fact upon a cold record, and substitute our judgment for that of the trial court with respect to such issues, or that a district court, in nonjury cases, is to act as a sort of special master for this Court, to report testimony, to make advisory findings, and to enter an advisory judgment.

There is no logical reason for placing the findings of fact of a trial judge upon a substantially lower level of conclusiveness than the fact findings of a jury of laymen, or those of an administrative agency, which may be set aside only if unsupported by substantial evidence. The findings of fact of a trial court should be accepted by this Court as being correct unless it can be clearly demonstrated that they are without adequate evidentiary support or were induced by an erroneous view of the law. The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court."

Here the trial judge saw and heard the witnesses and was in a far better position to determine close questions of fact than is an appellate court on a cold record. It is argued by appellant that Wirt Cook had a motive in setting the fire, that is, financial profit, yet appellee points out that the amount of Wirt Cook's indebtedness eliminated any possibility of his recovering anything for himself. Appellee also points out that the record is devoid of any evidence directly connecting Wirt Cook with the setting of the fire. These things are matters which peculiarly present themselves for determination by the finder of the facts and, where the finder of such facts does not abuse the discretion which the law places on him, an appellate court has no right to substitute its judgment therefor.

Affirmed.